No. 78-1656

In the Supreme Court of the United States

OCTOBER TERM, 1978

INDEPENDENT STAVE COMPANY, DIVERSIFIED INDUSTRIES DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-20) is reported at 591 F.2d 443. The Board's decision and order (Pet. App. 26-43) are reported at 233 N.L.R.B. No. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21-24) was entered on February 15, 1979. The petition for a writ certiorari was filed on May 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that an employer's unilateral modification of an arbitration provision in a collective bargaining agreement violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act.

STATEMENT

1. Petitioner ("the Company") has been a party to three successive three-year collective bargaining agreements with Coopers' International Union of North America, AFL-CIO ("the International") and its affiliated Local Union No. 7 ("Local 7") (Pet. App. 32). The last of these agreements, effective from November 4, 1974, through November 3, 1977, contained a grievance and arbitration clause which provided: "The processing of grievances and arbitrations shall be solely handled by the Local Union" (Pet. App. 33, 47).

In 1975 Local 7's President Lundblade filed eight grievances with Company President Boswell (Pet. App. 33). After Boswell stated on several occasions that there was no basis for the grievances and nothing to arbitrate, Local 7 filed an action in the United States District Court for the District of Missouri under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to compel arbitration of the grievances (Pet. App. 33; Tr. 16, CPX 1).[1] The parties thereafter executed a partial settlement, agreeing to arbitrate five of the grievances (Pet. App. 33; Tr. 16-17, GCX 4).

One of these grievances went to arbitration in August 1976. Local 7 prevailed, and back pay was awarded to three employees (Pet. App. 33; Tr. 18-19, CPX 3). Local 7 was represented in the arbitration by a member of the law firm that also represents the International (Pet. App. 36; Tr. 18-19, 129-131). Local 7's attorneys' fees for the case

[1]"Tr." refers to the transcript of the unfair labor practice preceeding; "GCX." "RX" and "CPX" refer to the General Counsel's, the Company's, and the Charging Party's exhibits, respectively.

were paid from a "defense fund" held by the International union but funded by its affilated locals and maintained for their use (Pet. App. 36; Tr. 80-83, 131-133).

Subsequently, the Company refused to proceed to arbitration on two other grievances or to pay the back pay award (Pet. App. 33; Tr. 15, 20-21, 23-24). It filed a petition in a Missouri state court seeking a declaratory judgment that the International could not, under the collective bargaining agreement, furnish aid and assistance in Local 7's arbitrations (Pet. App. 33; RX 3). Local 7 then amended the complaint in its federal court action to request arbitration of the two other grievances and enforcement of the arbitrator's award (Pet. App. 33; Tr. 15-16, 23-28, CPX 3). Thereafter, the Company filed a suit in the United States District Court for the Western District of Kentucky seeking to enjoin the International from participating in the handling and processing of grievances (Pet. App. 33-34; RX 2).[2]

Late in 1976, Local 7 filed two additional grievances. After discussion, Local 7 and the Company agreed to arbitrate one of them (Pet. App. 34; Tr. 30-32, 35-39, GCX 10). On February 3, 1977, after representatives met to select an arbitrator, Company President Boswell wrote a letter to the arbitrator noting the contractual provision that the processing of grievances and arbitrations would be solely handled by the Local Union (Pet. App. 34-35; Tr. 40-42, GCX 13). He then stated that the purpose of the provision was to limit the number of "petty grievances aggravated and financed by the Coopers' International Union," that he had "proof"

[2]All three suits are pending.

that both Local 7 and the International had violated the provision, and that suits were pending against Local 7 and the International seeking relief and damages (Pet. App. 34-35; GCX 13). Boswell concluded his letter with the following demand (Pet. App. 34-35; GCX 13):

> We want the arbitration you will conduct to be strictly to the letter of the contract. To insure the arbitration is solely handled and financed by Local 7, I do not feel it is out of order to request those representing Local 7 and the officers of Local 7 to sign an affidavit stating the Coopers' International Union has not instructed, conferred, employed, paid or guaranteed payment, or in any direct or indirect way entered into the pursuit of this grievance. Also, that all the work and expenses occurring from the grievance and arbitration is born [*sic*] solely by Local 7.

The arbitrator responded by proposing a two-stage arbitration hearing, the first stage to consider the matters raised by the Company's letter and the second to consider the merits of the grievance (Pet. App. 35; GCX 17). Local 7 agreed to this proposal, but the Company rejected it and continued to demand the affidavits as a precondition to arbitration (Pet. App. 35; GCX 18, 19). The Company also denied the correctness of a statement by the arbitrator that the Company's position was "tantamount to [a] refusal to arbitrate," expressed doubt that it would get fair consideration at an arbitration hearing, and stated: "We welcome the NLRB to seek the facts of this matter" (GCX 20, 21).

2. The International and Local 7 then filed an unfair practice charge with the Board, alleging that the Company had violated Sections 8(a)(1) and 8(a)(5) of the

Act, 29 U.S.C. 158(a)(1) and 8(a)(5). The Board, adopting the decision of its administrative law judge, found that the Company violated Sections 8(a)(1) and 8(a)(5) by insisting on the affidavit from Local 7 as a condition to arbitration and thereby unilaterally modifying the collective bargaining agreement (Pet. App. 26-27, 40). The Board found that the contract did not preclude the Local from "consult[ing] or * * * confer[ring] with the International on the advisability of filing a grievance or how best to process a grievance * * *" (*id.* at 37). The Board also found that the International was not bearing the expense of the Local's grievance and arbitration proceeding (*id.* at 36). It therefore concluded that the limitations to arbitration reflected by the Company's demand constituted a modification of the contract.

The Board ordered the Company, *inter alia*, to withdraw its insistence on the affidavit as a condition to arbitration (Pet. App. 41).

3. The court of appeals concluded that the "Board's finding that [the Company] made a unilateral mid-term change in the collective bargaining agreement * * * by refusing to arbitrate unless the disputed affidavit was signed is supported by substantial evidence on the record as a whole" (Pet. App. 17). It therefore enforced the Board's order, except in one respect not material here.[3]

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[3]The court held that, because the evidence supported a finding that the Company had refused to bargain only with respect to the arbitration clause, it would not enforce a broad bargaining order (Pet. App. 20).

The court agreed with the Board that the affidavit on which the Company insisted before proceeding to arbitration went beyond the requirements of the arbitration clause. The court stated:

> The clause is quite clear. It simply provides that grievances submitted to arbitration "shall be solely handled by the local union." It does not prohibit the local from being advised or counseled by the International Union with respect to handling grievances in arbitration. It does not prohibit the International Union from advising the local as to the merits of grievances, it does not specifically prohibit the local from employing counsel to assist it in preparing and submitting grievances to arbitration, and it does not specifically bar the International Union from contributing to the expense incurred in processing grievances through arbitration.

Pet. App. 18.[4]

The court also rejected the Company's contention that a breach of an agreement to arbitrate is not within the Board's jurisdiction but is a matter solely for the courts under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. The court stated (Pet. App. 20):

> Here, the union agreed to permit the arbiter to decide precisely what was meant by the disputed words and the employer refused. Moreover, it is clear that the Board has the power to interpret collective bargaining agreements pursuant to the enforcement of statutory rights. *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 424-430 (1967); *N.L.R.B. v. Huttig Sash & Door Co.*, [377 F. 2d 964, 968-970 (8th Cir. 1967)]. Similarly, under § 10(a) of the Act, the Board may "proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts." *N.L.R.B. v. Strong*, 393 U.S. 357, 361 (1969).

[4]The court also concluded that the Board's finding that the defense fund "was not a fund of the International Union but was a fund held by the International Union for the benefit of the local unions and their members * * * has substantial support in the record" (Pet. App. 18).

ARGUMENT

Petitioner contends (Pet. 8-11) that a breach of an arbitration provision in a collective bargaining agreement is not an unfair labor practice but may be redressed by courts only in a suit to enforce the agreement under Section 301 of the Labor Management Relations Act. The court of appeals properly rejected this contention.

It is true that not every breach of a collective bargaining agreement constitutes an unfair labor practice within the Board's jurisdiction. See, *e.g.*, *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-188 (1971). It is also true that many actions that might violate a collective bargaining agreement are unfair labor practices. There is thus a substantial overlap between the Board's unfair labor practice jurisdiction and the jurisdiction of courts under Section 301. Thus, for example, if an employer fired an employee because of the employee's union activities, that would be a clear unfair labor practice although it might also be an actionable breach of a collective bargaining agreement. See, *e.g.*, *Allied Chemical & Alkali Workers of America, supra; NLRB* v. *Strong*, 393 U.S. 357, 361-362 (1969); *Vaca* v. *Sipes*, 386 U.S. 171, 179-180 (1967); *Smith* v. *Evening News Association*, 371 U.S. 195, 197-198 (1962).

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *," and Section 8(d) makes it a breach of that duty to bargain collectively for an employer, during the term of a collective bargaining agreement, to "terminate or modify such contract," except on certain conditions not pertinent here. In determining whether an employer's conduct merely constitutes a breach of the agreement subject to the sole jurisdiction of the courts under Section 301 or whether it also constitutes a termination or modification of the agreement, which is an unfair labor practice under Section 8(a)(5), the Board and the courts have generally considered whether the conduct represents isolated and unrelated actions on the part of the employer or whether, on the other hand, it represents a general change in a basic term or condition of employment fixed by the agreement. See *NLRB* v. *Los Angeles Yuma Freight Lines*, 446 F. 2d 210, 214 (9th Cir. 1971); *Amalgamated Clothing Workers of America* v. *NLRB*, 343 F. 2d 329, 331-332 (D.C. Cir. 1965); *C&S Industries, Inc.*, 158 N.L.R.B. 454, 458-459 (1966).[5] Thus, if an employer negotiates and signs an agreement providing for a wage of $5 per hour for his employees, and the next day he announces that he will pay them only $4 per hour, that would be not only a breach of the contract but also a blatant mid-term modification of the

[5]In *Allied Chemical & Alkali Workers of America, supra*, this Court established another basis for distinguishing between contract breaches that are subject only to court jurisdiction under Section 301 and those that are also unfair labor practices under Sections 8(a)(5) and 8(d); namely, whether the matter is one which is a mandatory subject of bargaining or only a permissive subject of bargaining. 404 U.S. at 187-188. Grievance procedures are plainly mandatory subjects of bargaining, and petitioner does not contend otherwise. *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962), enf. in rel. part sub nom. *Industrial Union of Marine Workers* v. *NLRB*, 320 F. 2d 615 (3d Cir. 1963); *NLRB* v. *Ross Gear & Tool Co.*, 158 F. 2d 607, 610 (7th Cir. 1974).

contract and thus a violation of his obligation to bargain collectively and in good faith. And in determining whether the employer's conduct constitutes a mid-term modification of the agreement in violation of Sections 8(a)(5) and 8(d), the Board has jurisdiction to construe the agreement. See *NLRB* v. *Strong, supra*, 393 U.S. at 361; cf. *NLRB* v. *C&C Plywood Corp.*, 385 U.S. 421 (1967).

In this case the court of appeals correctly affirmed the Board's determination that petitioner's conduct constituted a mid-term modification of the agreement and not simply an isolated breach of contract. Petitioner clearly stated its position that it would not process any grievances unless the union satisfied a specific condition. The Board found, and the Court agreed, that the condition was not provided for in the agreement and thus constituted a modification of it. That finding was correct. In any event there is no reason for this Court's review of a question that turns on the meaning of a provision in a particular collective bargaining agreement, particularly in view of petitioner's original refusal to submit the issue to the arbitrator and its indication that it would "welcome" the Board's resolution of the matter.[6]

[6]Contrary to petitioner's claim (Pet. 8-9), the decision below does not conflict with decisions of other circuits or with earlier decisions of the Board. The cases cited by petitioner (Pet. 8 nn. 4-8) involved either isolated breaches of contract (*NLRB* v. *Los Angeles Yuma Freight Lines, supra; Almalgamated Clothing Workers of America, supra; Central Rufina*, 161 N.L.R.B. 696, 700 (1966); *Textron Puerto Rico*, 107 N.L.R.B. 583 (1953)) or conduct that was not found to violate the agreement. *Danner Press, Inc.* v. *NLRB*, 374 F. 2d 230 (6th Cir. 1967). Cf. *National Dairy Products Corp.*, 126 N.L.R.B. 434 (1960); *United Telephone Co. of the West*, 112 N.L.R.B. 779 (1955), in which the Board declined to decide whether the conduct constituted a breach of the collective bargaining agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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